

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS: [REDACTED]

MTO'Brien

date: JAN 11 1999

to: District Director, New England District
Attn: Case Manager James Biracree; Team Coordinator Joel Michaud

from: District Counsel, New England District, Boston

subject: [REDACTED]
UIL# 6501.08-17 and 6901.05-00

THIS DOCUMENT INCLUDES STATEMENTS SUBJECT TO THE ATTORNEY-CLIENT AND THE ATTORNEY WORK PRODUCT PRIVILEGES. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE I.R.S., INCLUDING THE TAXPAYER INVOLVED, AND ITS USE WITHIN THE I.R.S. SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT.

This refers to your request that we review proposed language for the letter breaking agency under Treas. Reg. § 1.1502-77(a), Form 872 for [REDACTED], and transferee liability and related consents. This supplements our prior memoranda dated July 29, 1998 and October 23, 1998, and confirms a telephone conversation with Revenue Agent Joel Michaud on January 8, 1999.

You have asked that we review Forms 872, 977 and 2045 to be secured from [REDACTED], [REDACTED]'s subsidiary and [REDACTED]. Our prior memoranda, the facts of which are incorporated herein by reference, recommended that you consider breaking agency and deal directly with [REDACTED] and that you secure Forms 977 and 2045 from [REDACTED], as transferee of [REDACTED]. You subsequently advised that [REDACTED] was also the transferee of [REDACTED], another shareholder of [REDACTED] filed its final return in [REDACTED] and transferred its assets to [REDACTED]. Therefore [REDACTED] is a transferee of a transferee as well as a direct transferee of [REDACTED].

Letter Breaking Agency

With respect to your proposed letter breaking agency, we recommend that you address the letter to:

[REDACTED]
[REDACTED], Trustee

11541

[REDACTED]

Copies of the letter should also be sent to [REDACTED]'s address on its final return and the Power of Attorney on file. Just prior to the salutation, insert the following:

In Re: [REDACTED]

Taxable Years ended January 1, [REDACTED] and [REDACTED]

Forms 872

Since you have a Form 872 from [REDACTED] which expires after the date [REDACTED] goes out of existence under Delaware law, you do not need to obtain an additional consent from [REDACTED]. The Form 872 for [REDACTED] for the consolidated liability of [REDACTED] and [REDACTED], is correct, however we suggest that you place the language after "*" after paragraph (2) in the body of the document. [REDACTED] Form 872 for its [REDACTED] return for the year ended [REDACTED] is in correct form.

Forms 2045

You need to obtain two separate Forms 2045 from [REDACTED], the first as transferee of [REDACTED], and the second as transferee of a transferee of [REDACTED]. The Form 2045 for [REDACTED] as transferee of [REDACTED] is correct, however we are recommending changes to Form 2045 for its liability as transferee of [REDACTED]. Under the column labeled "Transferor" substitute the following under name:

[REDACTED] transferee of [REDACTED]

[REDACTED]'s address and EIN should be used. Since [REDACTED] is not a corporation, the corporate information should be deleted. For clarity, in the line listing the tax years add "of [REDACTED]".

Since [REDACTED] is primarily and severally liable for the consolidated liability and remains in existence, there is no need for a Form 2045 from [REDACTED] for [REDACTED] liability at this time.

Forms 977

As with the Forms 2045, you will need to obtain two forms 977 from [REDACTED], one as a direct transferee, the other as a

transferee of a transferee. The Form 977 you provided for [REDACTED]'s transferee liability is correct. The Form for [REDACTED]'s transferee liability of [REDACTED] as transferee is similar, with the following changes:

In lieu of [REDACTED], insert the following:

[REDACTED], as transferee of [REDACTED]
[REDACTED]

After the tax periods ended January 1, [REDACTED] & [REDACTED]
[REDACTED], add:

of [REDACTED]
[REDACTED].

If you need further assistance in this matter, feel free to contact me at (617) 565-7838.

GERALD J. O'TOOLE
District Counsel

By: Maureen T. O'Brien
MAUREEN T. O'BRIEN
Assistant District Counsel

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS: [REDACTED]

MTO'Brien

date: **OCT 23 1998**

to: District Director, New England District
Attn: Case Manager James Biracree; Revenue Agent Joel Michaud

from: District Counsel, New England

subject: [REDACTED]

Transferee Liability
UIL# 6501.08-17 and 6901.05-00

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This supplements our prior memorandum dated July 29, 1998, concerning extending the statute of limitations on assessment after the dissolution of [REDACTED] for it and its subsidiary, [REDACTED] for the year ended January 1, [REDACTED]. This memorandum makes recommendations for dealing with the imminent expiration of the winding down period for the parent corporation, [REDACTED] and any future consents which may be secured.

As we noted in our July 29, 1998 memorandum, [REDACTED] a Delaware corporation, remains in existence, absent action by the Chancery Court, until [REDACTED]. In states in which a dissolved corporation continues in existence for purposes of winding up its affairs, any authorized officer of the corporation may sign a consent during the period the corporation continues in existence. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. See also H.D. Waldbridge and Co., Inc. v. Commissioner, 25 B.T.A. 1109, 1113 (1932) (one of the powers granted to a Delaware corporation, even during the three-year winding-up period, is the power to execute consents to extend the statute of limitations for assessment on its behalf). Therefore, the consent executed on [REDACTED] for the year ended [REDACTED] of [REDACTED] and subsidiary is valid. However, since [REDACTED] is likely to go out of existence on [REDACTED] which is before the expiration of the statute of limitations for the year ended [REDACTED] as extended, and which may be prior to any agreement being reached on the potential audit adjustments, we are

recommending that you take the actions outlined below to protect the government's interest in assessing and collecting any proposed deficiency.

[REDACTED] and [REDACTED] are severally liable (and therefore directly and primarily liable) for any resulting consolidated tax liability. Liability as transferee does not arise until it is shown that the tax cannot be collected from the one primarily liable as a taxpayer. Oswego Falls Corporation v. Commissioner, 26 B.T.A. 60 (1932). Accordingly, the fact that [REDACTED]'s existence will soon terminate may not necessarily open the door for the Service to go after and collect any resulting deficiencies from the transferees, at least not while [REDACTED] is solvent and continues to exist.

After [REDACTED]'s existence is terminated, there will be no person with authority to act on its behalf and, therefore, after the three year winding-up period there could be no determination of the merits of the Government's claim on behalf of the parent corporation and subsidiary. Therefore, the Service must do more than obtain an extension of the statute of limitations, it must also issue a statutory notice of deficiency, See Ross v. Venezuelan-American Independent Oil Producers Assn., Inc., 230 F. Supp. 701, 702 (D. Del. 1964) (notice of deficiency must be issued within 3-year winding up period to be valid), and the taxpayer must file a petition with the Tax Court before the three-year period expires if it intends to contest the notice. Badger Materials, Inc. v. Commissioner, 40 T.C. 725 (1963), withdrawn in part and modified in part, 40 T.C. 1061 (1963) (informal conference and execution of consents to extend federal income tax statute of limitations were found to be insufficient to constitute a "cause of action" commenced during the two-year winding-up period following a Wisconsin corporation's dissolution).

Since the expiration of the winding up period for [REDACTED] is imminent and it appears unlikely that an agreement will be reached before that time, it is recommended that you consider breaking agency under Treas. Reg. § 1.1502-77(a), thus allowing you to deal with each member of the consolidated group individually with regard to extending the statute of limitations for assessing income taxes due on the consolidated return filed by [REDACTED] and its consolidated subsidiary for fiscal tax years ending January 1, [REDACTED] and [REDACTED]. In order to deal with each member individually, we recommend that prior to [REDACTED] you send a letter to [REDACTED] the common parent, clearly notifying it that the Service is breaking agency and intends to deal with each member of the consolidated group individually. Treas. Reg. § 1.1502-77(a). To ensure proper service, you should send the letter to [REDACTED]'s last known address and also send a letter "in care of" the liquidating trustee. Once agency is broken, you should obtain a Form 872 from [REDACTED] for the consolidated years ended January 1, [REDACTED] and [REDACTED] and two Forms 872 from its former subsidiary, [REDACTED] the first for the consolidated years ended January 1, [REDACTED] and [REDACTED] and the second for its individual short year ended [REDACTED].

On the Form 872 that you send to [REDACTED] you should list as the taxpayer on page 1: "[REDACTED] (EIN [REDACTED])" and put an asterisk beside it. At the bottom of page 1, put "*" for [REDACTED] (EIN [REDACTED]) [REDACTED] consolidated group for tax years ended January 1, [REDACTED] and [REDACTED]."

We have been advised that [REDACTED] noted on its return for the period ended [REDACTED] that the return was its final return. However, it would appear that returns may have been required for the periods ended January 1, [REDACTED] and April 25, [REDACTED] since it did not dissolve until the latter date. If you determine that returns were filed for periods after [REDACTED] to the date of dissolution, you may wish to secure Forms 872. On these Form(s) 872 for [REDACTED] you should list as the taxpayer on page 1 of the Form 872: "[REDACTED] (EIN [REDACTED])."

With regard to [REDACTED] for the consolidated returns for the years ended January 1, [REDACTED] and [REDACTED] you should list as the taxpayer on page 1 of the Form 872: "[REDACTED] (EIN [REDACTED])" and put an asterisk beside it. At the bottom of page 1, put "*" for the [REDACTED] (EIN [REDACTED]) & Subsidiary consolidated group for tax years ended January 1, [REDACTED] and [REDACTED] " Form 872 for [REDACTED] short period return for [REDACTED] should read: "[REDACTED] (EIN [REDACTED])", without any qualification.

Further, under the facts of this case and considering that [REDACTED] is in the process of liquidating, you may wish to obtain Forms 977 and 2045 from its shareholders. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305 (shareholders liable under I.R.C. § 6901 as transferees may sign consents for their own liabilities).

If you need additional assistance, feel free to contact me at (617) 565-7895.

DAVID N. BRODSKY
Assistant District Counsel

By:

Maureen T. O'Brien

MAUREEN T. O'BRIEN
Attorney

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:NED:BOS: [REDACTED]

MTO'Brien

date: July 29, 1998

to: District Director, New England District
Attn: Case Manager James Biracree; Team Coordinator Joel Michaud

from: District Counsel, New England

subject: [REDACTED]

Form 872 - Earliest Statute of Limitations Expires [REDACTED]
UIL #6501.08-10 Execution of waiver by liquidating corporation

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This confirms oral advice given to Case Manager James Biracree and Team Coordinator Joel Michaud concerning the proper format for a Form 872 to be prepared for the above taxpayer.

ISSUES

1. What forms should be used to extend the statute of limitations on assessment for the above named taxpayer?
2. How should the statute extension be titled?
3. Who should execute the statute extension?

CONCLUSIONS

1. Form 872 is the proper form to use to extend the statute of limitations on assessment because [REDACTED] which was dissolved on [REDACTED] [REDACTED] is still in existence until [REDACTED] under Delaware law.

2. The Form 872 should be titled "[REDACTED]". The current address of the liquidating trustee should be used. You may wish to add "formerly, [REDACTED] the address on the final return.
3. The liquidating trustee is the proper party to sign for [REDACTED]

FACTS

[REDACTED] a Delaware corporation, was the parent of a consolidated group with [REDACTED] a Maine corporation, its subsidiary.¹ On [REDACTED] sold its stock in [REDACTED] to [REDACTED] s return for the year ended January 1, [REDACTED] was filed on [REDACTED] filed its final return for the short year ended [REDACTED] on [REDACTED] which was signed by the liquidating trustee. [REDACTED] filed for dissolution on [REDACTED] The final return was signed by the Trustee under [REDACTED]

No designation pursuant to Treas. Reg. § 1.1502-77(d) was made by the taxpayer or the members of its group.

You have asked what form should be used to extend the statute of limitations on the consolidated tax returns of [REDACTED] and subsidiary. You have also asked who should sign the extension.

DISCUSSION

Under Delaware law, a dissolved corporation continues in existence for 3 years after dissolution or for such longer period as the Court of Chancery shall in its discretion direct, for the limited purpose of defending suits, of settling corporate affairs, closing the business, disposing of and conveying its property, discharging its liabilities and distributing its remaining assets. 8 Del. C. § 278 (1997). A trustee may be appointed to take charge of the corporation's property, and to do all other acts necessary for the final settlement of the unfinished business of the corporation. 8 Del. C. § 279 (1997). Therefore, [REDACTED] remains in existence, absent action by the Chancery

¹You have given us additional facts pertaining to [REDACTED] s acquisition of [REDACTED] in [REDACTED] which are not discussed herein. We will address those facts and their relationship to potential issues in this case in a later memorandum. This memorandum is limited to consents due to the imminent expiration of the statute of limitations.

Court until [REDACTED]. The duly appointed liquidating trustee may act on behalf of the corporation.

The consolidated return regulations have provisions for execution of consents when a corporation is dissolved. Generally, the common parent with certain exceptions, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated tax year, including signing consents to extend the period of limitations for all members of the group. Treas. Reg. § 1.1502-77(a). If the common parent contemplates dissolution, is about to be dissolved or for any other reason its existence is about to terminate, it shall notify the District Director of such fact and designate another member to act as agent in its place, subject to approval of the District Director. If the notice is not given, or the designation is not approved by the District Director, the remaining members may designate in writing to the District Director, another member to act as agent, subject to approval of the District Director. Treas. Reg. § 1.1502-77(d). As noted above, no agent was designated by the taxpayer or its subsidiary.

Temp. Reg. § 1.1502-77T(a)(4) provides for alternative agents if the common parent ceases to be the common parent of the consolidated group, whether or not the consolidated group remains in existence. A waiver of the statute of limitations with respect to the group given by the common parent of the group for all or any part of the year to which the waiver applies, is deemed to be given by the agent of the group. Temp. Reg. § 1.1502-77T(a)(3) and (4)(I). Therefore, even though the consolidated group is no longer in existence, [REDACTED] is still in existence and therefore is authorized to execute the waiver since it was the common parent for the [REDACTED] and [REDACTED] consolidated tax years.

We recommend that you secure a Form 872 from the liquidating trustee of [REDACTED] [REDACTED] for the consolidated return liabilities. Form 872 should be titled "[REDACTED] EIN [REDACTED]" We also recommend that the address on the consent be the current address of the liquidating trustee, followed by "Formerly [REDACTED]"

A corporation's president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other duly authorized officer may execute a consent, whether or not that person is the same person who signed the return. If a corporation continues to exist under state law after dissolution, any authorized officer may execute a consent. Rev. Rul. 83-41, 1983-1 C.B. 349, as amplified by Rev. Rul. 84-65, 1984-1 C.B. 32. Since [REDACTED] continues to exist under state law and the liquidating trustee is authorized to act on its behalf, the duly authorized liquidating trustee of [REDACTED] may execute the consent.

If you need additional assistance in this matter, you may contact me at (617) 565-7838.

DAVID N. BRODSKY
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By: /S/MAUREEN T. O'BRIEN
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